

No 42. property *in forma specifica*, and, therefore, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Armadale*.

Act. *Campbell*.

Agent, *Jo. Dillon*.

Alt. *Brown*.

Agent, *J. Somerville, Junior*.

Clerk, *Sinclair*.

J.

Eac. Col. No 39. p. 80.

1804. *March 10.* LORD GLENLEE *against* GORDON and Others.

No 43.

An heritor is not entitled to interrupt the natural course of a river, by collecting the water in a reservoir, and allowing it to run down as it suits his own convenience.

THE mansion-house of Barskimming, the seat of the Honourable Sir William Miller of Glenlee, Baronet, one of the Senators of the College of Justice, is situate upon the south bank of the river Ayr, which runs through his park and pleasure grounds. The mill of Barskimming, which is in the immediate neighbourhood, and which belongs to Lord Glenlee, is supplied with water by means of a loose parapet of stone, thrown across the river, a little below its junction with a stream called the Lugar. There is a flax-mill likewise upon the estate of Barskimming, which is supplied with water from the Ayr, by a dam constructed farther up the river, and before the confluence of the streams.

About two miles above Barskimming mill, upon the estate of a neighbouring heritor, there had been formerly a corn-mill, which, many years ago, was converted into a cotton manufactory, and the original dam was, upon that occasion, considerably enlarged, on account of the additional supply of water necessary for the machinery. This cotton work having become the property of John Gordon, and others, merchants in Glasgow, under the name of the Catrine Cotton Company, they, in the year 1801, constructed a large reservoir, occupying an acre of ground, for the purpose of accumulating the water during the night, when the stream, in its natural state, was insufficient for supplying their machinery. The water was thus collected, and let out as found necessary; so that, even in a dry season, there was a regular supply, for the purposes of the manufacture. But while the water was accumulating, no part of it was allowed to pass down the channel of the river. With the view of obtaining a still farther command of water, the Catrine Company, in the year 1802, were proceeding to construct another reservoir, of large dimensions, which would have been attended with the same effect, in a still greater degree, when Lord Glenlee raised a summons of declarator against the Company, concluding, "That the pursuer has, in virtue of his rights and infeftments, and possession for time immemorial, good and undoubted right and title to the full, free, and uninterrupted benefit and enjoyment of the whole of the water of the foresaid rivers of Ayr and Lugar, for all uses to which an heritor may lawfully employ the water of a river which runs through his lands, and, particularly, for the use of the said mill of Barskimming, according to use and wont; and that the said John

Gordon, Archibald Smith, and Kirkman Finlay, had no right or title whatsoever to make any reservoir or reservoirs, or other *opus manufactum*, for the purposes of diverting or arresting and detaining the stream of the river, and keeping the same dammed up, and thereby stopping its course, and preventing the stream, for a time, from returning with its ordinary and accustomed current through the pursuer's property: And being so found and declared, the said John Gordon, Archibald Smith, and Kirkman Finlay, ought and should be decerned and ordained instantly to demolish all such reservoirs or works already made, and should be prohibited and discharged from hereafter making any reservoir, or other *opus manufactum*, whereby the stream of the river may be diverted from its bed for a time, or detained and arrested in its bed, and prevented from continually returning thereto, and running therein, through the pursuer's property, with its usual and accustomed current, according to the immemorial use and wont, for the benefit and use of the pursuer's lands, in all lawful particulars whatsoever, and especially for the use of his said mill of Barskimming, in all time coming," &c.

The Lord Ordinary reported the cause. The pursuer

Pleaded; There is a great difference between *aqua fluvia* and *aqua profluens*. The one is the exclusive property of the heritor upon whose ground it falls; the other is enjoyed by him along with others. Every heritor is entitled to the use and enjoyment of a river in its natural condition, as it passes through his property. From the nature of a stream, any material innovation in its condition affects not only the portion of it where the alteration is made, but the whole course of the river; and, consequently, the interest of all the inferior proprietors. Running water cannot, therefore, be said to be exclusively the property of any one heritor, except in so far as he is entitled to the use of it as it passes along. The circumstance of one heritor having his grounds situate farther up a river, entitles him, indeed, to take the use of it first; but not to erect any work which will enable him to derive a greater benefit from the stream than nature has given him, to the diminution of the convenience of the other proprietors, who have a joint usufructuary right to the stream in its natural condition; D. lib. 39. tit. 3. l. 1. § 1.; lib. 43. t. 13. l. 1. § 1.; lib. 43. t. 12. l. 1. § 12.; Stair, b. 2. t. 7. § 12.; Erskine, b. 2. t. 9. § 13.; Bankton, vol. 1. p. 681.; Bannatine against Cranstoun, 25th June 1624, No 3. p. 12760.; Bairdie against Scarston, July 1624, *voce* SERVITUDE.

That the operations of the defenders are of essential inconvenience to the pursuer is abundantly evident. By accumulating the water, and preventing it from flowing regularly along the channel, the mill of Barskimming is often prevented from working; the fishing is greatly deteriorated; and the natural beauty of the place is materially injured, when the channel of the river is deprived of water. Any one of these evils resolves itself ultimately into a patrimonial loss, so as to afford sufficient ground for the pursuer to insist upon the river being left in its natural state; and when taken together, they amount to

No 43. an injury amply sufficient to authorise the conclusions of the declarator; Fairly against Earl of Eglintoun, 26th January 1744, No 15. p. 12780. Kelso against Boyds, 1st July 1768, No 29. p. 12807.; Brown against Burges, 30th November 1790 *; Henderson against Crookshank, 17th November 1791 *; Ogilvie against Kincaid, 25th November 1791, No 37. p. 12824.; Jamieson against Earl of Abercorn, 7th December 1791 *; Hamilton against Edington, 5th March 1793, No 38. p. 12824.; Fergusson against Merchant Maiden Hospital, 18th June 1800, see APPENDIX.

But the damage occasioned by such operations upon the water is not confined to one individual heritor. If a proprietor were entitled to carry on such works, it might be attended with injury and ruin to mills, fisheries, and manufactures, to a prodigious extent; and if the river be of a size to admit of such an use, the navigation of vessels might be deranged and interrupted. If ever the natural limits of an heritor's right to the usufructuary use of a stream be transgressed, it is impossible to ascertain the mischief that might consequently ensue. The right which an heritor has to the use and enjoyment of a river, instead of being a valid and substantial right, would be fluctuating, ambulatory, and defeasible, possessed at the mercy of every other heritor, whose property happened to be nearer to its source. It would not deserve the name of a right of property at all, the very essence of which is security and stability.

The interest of manufactures cannot justify such a violation of the natural rights of proprietors. It may happen, as in this case, that these operations, which facilitate the works of one heritor, destroy those of another; and the mill at Barskimming is made to suffer for the convenience of the mill at Catrine. Accordingly, in England, where all due encouragement is given to manufactures, such an use of a river as is here attempted is not authorised; for, however convenient for one individual, it is held inconsistent with the rights of adjacent proprietors; *Brown versus Best*, Trin. Term, 19th and 20th Geo. II. Wilson's Reports, i. 174.

Answered; Every heritor upon the banks of a river is entitled to use the water according to his own convenience, provided he use it *salva fluminis substantia*. For this purpose, he may construct a dam, or aqueduct, for enabling him to drive machinery, provided his operations do not occasion the water to restagnate upon the superior, or to descend in floods to the inferior heritors, or divert the current of the river from its natural course, so as to prevent it altogether from descending to the other proprietors.

But if the doctrine maintained by the pursuer be well founded, and if any alteration on the natural condition of a stream be sufficient to entitle an inferior heritor to object, there would be an effectual bar to all those uses of a river, by which it is made subservient to the purposes of machinery. Every dam for driving a mill is an innovation upon the natural state of the stream, and in a

* These cases not reported, see APPENDIX.

greater or less degree accumulates the water, and prevents it from flowing regularly down the channel. There is no expediency in confining a proprietor to use the stream merely as it exists by nature; and if he were to be so restricted, it would tend to restrain the exertion of industry, and prevent the extension of useful manufactures.

Every question of this sort, therefore, is to be determined by the circumstances of the case, and not by any general reasoning concerning the nature of rivers. The operations of the defenders do not destroy or withdraw any of the water. There is at all times transmitted as much of it as is necessary for the primary uses of the stream; and it is only in seasons of drought or frost, that the actual course of the river is affected; and even then, it is only for a few hours, and chiefly during the night, that the water is collected and detained. This temporary detention affords a stronger current during the day; and so far from affecting the mill of Barskimming, rather tends to afford it a more plentiful and regular supply. The diminution of amenity arising from thence, if it exist at all, must be extremely trifling, and such as can never be allowed to come in competition with such a profitable use of the river. And with respect to the fishing, there is at all times such a quantity of water in the pools of the river, even while it is collecting, as to prevent the pursuer from being in any degree deprived of that advantage.

The authorities quoted from the Roman law are not applicable to such operations, but relate chiefly to the case of public or navigable rivers, upon which no obstructions, prejudicial to the public interest, are permitted; *D. lib. 30. l. 1. § 21.*; *Ibid. § 11.*; *Pompon. lib. 32. ad Q. Mucium.* But, even if the Roman law were different, the Romans were so little acquainted with manufactures, that the authority of their law is of less weight in such cases.

The universal and immemorial usage of this country must go a great way in ascertaining the consuetudinary law of the land, especially when supported by sound principles of justice and expediency. The right of an heritor to accumulate water has been always understood, and has been recognised in a variety of decisions, which are much more analogous to the present case than those cited by the pursuer; *Cunningham against Kennedy, 22d November 1713, No 11. p. 12778.*; *Lyon and Gray against Bakers of Glasgow, 7th January 1749, No 17. p. 12789.*; *Magistrates of Linlithgow against Elphinston, 14th January 1768, No 28. p. 12805.*; *Wallace against Morrison, 16th June 1761, voce SERVITUDE.*

The Court, (25th November 1803,) before answer, ordained the defenders to put in a condescence of what they offered to prove: And afterwards, upon advising the same with answers, being satisfied, from the statements on both sides, that the operations of the defenders must be attended with prejudice to the inferior heritor, pronounced the following interlocutor:

No 43.

“ Repel the defences, and find, decern, and declare, in terms of the libel ; superseding extract till the third sederunt day in May next ; and further, prohibit the defenders from hereafter using any reservoir, or other *opus manufactum*, whereby the stream of the river may be diverted from the bed for a time, or detained or arrested in its bed, and prevented from continually running therein through the pursuer’s property ; and allow an interim-decree to go out and be extracted, for giving immediate effect to this prohibition.”

Lord Ordinary, *Metbuen*.

Act. *Solicitor-General Blair, Robertson, Hume.*

Agent, *George Napier.*

Alt. *Lord Advocate Hope, Ross, Clerk, Reddie.*

Agent, *R. Hill, W. S.*

Clerk, *Ferrier.*

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Fac. Col. No 157. p. 353.

Exercise of Property within Burgh subject to Regulations.—See PUBLIC POLICE.

Restrictions on the use of Property when inconsistent with Public Police.—See PUBLIC POLICE.

Property in Ships taken from the Enemy.—See PRIZE.

Conventional Limitations on the use of Property.—See SERVITUDE.

Property in Mines and Minerals.—See REGALIA.

Property of Lands how transferred.—See INFESTMENT.

See APPENDIX.